

FEB 24 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

V.

RAMON PEREZ-DIAZ,

Defendant - Appellant.

No. 04-50617

D.C. No. CR-04-00136-WQH

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
William Q. Hayes, District Judge, Presiding

Argued and Submitted February 8, 2006
Pasadena, California

Before: BEEZER, T.G. NELSON, and GOULD, Circuit Judges.

Defendant Ramon Perez-Diaz appeals his jury conviction for importation of,
and possession with intent to distribute, methamphetamine, in violation of

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

21 U.S.C. §§ 841(a)(1), 952, and 960, and his sentence. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm Perez-Diaz’s conviction, vacate his sentence, and remand for re-sentencing.

The district court properly admitted the methamphetamine. Perez-Diaz failed to demonstrate that the search at the border in which the Inspector discovered the methamphetamine resulted in any damage to, or destruction of, his truck.¹ In addition, the district court was well within its discretion in refusing to give the proposed “theory of defense” jury instruction in its entirety.² The second sentence of the instruction proposed by the defense was argumentative and assumed the existence of Julio and his alleged role, issues about which questions of fact existed.³ The first sentence of the proposed instruction, which the judge

¹ *United States v. Flores-Montano*, 541 U.S. 149, 155–56 (2004); *see United States v. Bennett*, 363 F.3d 947, 951 (9th Cir.), *cert. denied*, 543 U.S. 950 (2004); *United States v. Camacho*, 368 F.3d 1182, 1183 (9th Cir. 2004) (reviewing de novo the district court’s denial of a motion to suppress evidence).

² *See United States v. Shipsey*, 363 F.3d 962, 966 n.3 (9th Cir. 2004) (reviewing the district court’s formulation of jury instructions for abuse of discretion).

³ *United States v. Parker*, 991 F.2d 1493, 1497 (9th Cir. 1993); *United States v. Hall*, 552 F.2d 273, 275 (9th Cir. 1977).

adopted, adequately covered Perez-Diaz's theory of defense – that he unknowingly transported methamphetamine in his truck.⁴

Regarding Perez-Diaz's sentencing, the district court correctly denied his application for a "safety valve" reduction pursuant to USSG § 5C1.2 and 18 U.S.C. § 3553(f). Perez-Diaz did not satisfy his burden to show entitlement to a safety valve reduction.⁵ The district court also did not err by denying Perez-Diaz's application for a minor role adjustment under USSG § 3B1.2 because Perez-Diaz failed to show that he was "substantially" less culpable than Julio.⁶

Perez-Diaz preserved his claim that his sentence violated *United States v. Booker*⁷ by challenging the jury verdict form. Accordingly, we vacate Perez-Diaz's sentence and remand for re-sentencing consistent with *Booker*.⁸

Conviction AFFIRMED; Sentence VACATED AND REMANDED.

⁴ See *Parker*, 991 F.2d at 1497; *Hall*, 552 F.2d at 275–76.

⁵ See USSG § 5C1.2; 18 U.S.C. § 3553(f); *United States v. Ajugwo*, 82 F.3d 925, 929 (9th Cir. 1996).

⁶ See *United States v. Johnson*, 297 F.3d 845, 874 (9th Cir. 2002).

⁷ 543 U.S. 220 (2005).

⁸ See *United States v. Kortgaard*, 425 F.3d 602, 611 (9th Cir. 2005).